

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GREGORY ERIC EMISON,  
Plaintiff,  
v.  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
Defendant.

NO. CV 12-07747 AGR

MEMORANDUM OPINION AND  
ORDER

Gregory Emison filed this action on September 13, 2012. (Dkt. No. 3.) Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge on October 5, and October 12, 2012. (Dkt. Nos. 8-9.) On May 29, 2013, the parties filed a Joint Stipulation ("JS") that addressed the disputed issue. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court affirms the decision of the Commissioner.

## I.

**PROCEDURAL BACKGROUND**

On June 8, 2011, Emison filed an application for disability insurance benefits, alleging an onset date of September 5, 2010. Administrative Record (“AR”) 28. The application was denied initially and upon reconsideration. *Id.* Emison requested a hearing. On March 26, 2012, an Administrative Law Judge (“ALJ”) conducted a hearing at which Emison, a medical expert (“ME”), and a vocational expert (“VE”) testified. AR 28, 60-84. On April 4, 2012, the ALJ issued a decision denying benefits. AR 25-37. On June 22, 2012, the Appeals Council denied the request for review. AR 8-12. This action followed.

## II.

**STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

“Substantial evidence” means “more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the Court must defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

1 III.

2 **DISCUSSION**

3 **A. Disability**

4 A person qualifies as disabled, and thereby eligible for such benefits, “only  
5 if his physical or mental impairment or impairments are of such severity that he is  
6 not only unable to do his previous work but cannot, considering his age,  
7 education, and work experience, engage in any other kind of substantial gainful  
8 work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20,  
9 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

10 **B. The ALJ’s Findings**

11 The ALJ found that Emison met the insured status requirements through  
12 June 30, 2015. AR 30. He had the following severe impairments: non-Hodgkin’s  
13 lymphoma (in remission), status post-right shoulder arthroscopic surgery, right  
14 shoulder degenerative joint disease, right elbow pain, and bilateral symmetrical  
15 sensorineural hearing loss. *Id.*

16 Emison had the residual functional capacity (“RFC”) to perform light work<sup>1</sup>  
17 not involving “sitting, standing and/or walking in excess of 6 hours total per 8 hour  
18 workday, lifting/carrying in excess of 10-20 lbs., climbing ladders, performing  
19 balancing tasks or working at heights, more than occasional use of his dominant  
20 right upper extremity above shoulder level, using his left upper extremity to  
21 perform forceful tasks or more than frequent fine and gross manipulative tasks, or  
22 performing any work tasks requiring acute hearing or working in noisy  
23 environments.” AR 32-33. Emison is capable of performing past relevant work  
24 as a studio artist. AR 36-37.

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26 <sup>1</sup> Light work involves lifting and/or carrying no more than 20 pounds  
27 occasionally and 10 pounds frequently; sitting, standing and/or walking for six  
28 hours out of an eight-hour workday with regular breaks; pushing or pulling within  
those weight limits; occasionally climbing ramps, stairs, ladders, ropes, and/or  
scaffolds; occasionally stooping, kneeling, crouching, and/or crawling; and  
performing simple repetitive tasks. 20 C.F.R. § 416.967(b).

1           **C.     Credibility**

2           Emison argues that the ALJ improperly discounted his credibility.<sup>2</sup>

3           “To determine whether a claimant’s testimony regarding subjective pain or  
4           symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*  
5           *v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, “the ALJ must  
6           determine whether the claimant has presented objective medical evidence of an  
7           underlying impairment ‘which could reasonably be expected to produce the pain  
8           or other symptoms alleged.’” *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344  
9           (9th Cir. 1991) (en banc)). The ALJ found that Emison’s medically determinable  
10          impairments could reasonably be expected to produce the alleged symptoms.

11         AR 34.

12          “Second, if the claimant meets this first test, and there is no evidence of  
13          malinger, the ALJ can reject the claimant’s testimony about the severity of her  
14          symptoms only by offering specific, clear and convincing reasons for doing so.”  
15          *Lingenfelter*, 504 F.3d at 1036 (citation and quotation marks omitted). “In making  
16          a credibility determination, the ALJ ‘must specifically identify what testimony is  
17          credible and what testimony undermines the claimant’s complaints[.]’” *Greger v.*  
18          *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (citation omitted). The ALJ made no  
19          finding of malingering, but found that Emison’s statements concerning the  
20          intensity, persistence and limiting effects of the alleged symptoms were not  
21          credible to the extent they were inconsistent with the RFC assessment. AR 34.

22          In weighing credibility, the ALJ may consider factors including: the nature,  
23          location, onset, duration, frequency, radiation, and intensity of any pain;  
24          precipitating and aggravating factors (e.g., movement, activity, environmental  
25          conditions); type, dosage, effectiveness, and adverse side effects of any pain

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27          <sup>2</sup> Emison does not contend that his shoulder and hearing impairments  
28          rendered him unable to work. JS at 10. The ALJ acknowledged as much. AR  
34. Emison focuses on non-Hodgkin’s Lymphoma and chemotherapy. JS at 10.

1 medication; treatment, other than medication, for relief of pain; functional  
2 restrictions; the claimant's daily activities; and "ordinary techniques of credibility  
3 evaluation." *Bunnell*, 947 F.2d at 346 (citing Social Security Ruling 88-13)<sup>3</sup>  
4 (quotation marks omitted). The ALJ may consider (a) inconsistencies or  
5 discrepancies in a claimant's statements; (b) inconsistencies between a  
6 claimant's statements and activities; (c) exaggerated complaints; and (d) an  
7 unexplained failure to seek treatment. *Thomas v. Barnhart*, 278 F.3d 947, 958-59  
8 (9th Cir. 2002).

9 The ALJ acknowledged that Emison's treatment for non-Hodgkin's  
10 lymphoma "may have generally incapacitated [him] from regular work activity for  
11 a few months." AR 35. However, the statute defines disability as the "inability to  
12 engage in any substantial gainful activity by reason of any medically determinable  
13 physical or mental impairment . . . which has lasted or can be expected to last for  
14 a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The  
15 ALJ did not find a disabling condition for the required length of time. The ALJ  
16 discounted Emison's credibility for three reasons: (1) the available medical  
17 evidence did not support the degree of disability alleged; (2) Emison testified that  
18 he ceased working because he was laid off; and (3) there was no indication  
19 Emison was unable to perform any activities of daily living. AR 35.

20 "Although lack of medical evidence cannot form the sole basis for  
21 discounting pain testimony, it is a factor that the ALJ can consider in his credibility  
22 analysis." *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).

23 As the ALJ noted, the medical records indicate Emison was diagnosed with  
24 non-Hodgkin's lymphoma in March 2011. AR 31, 1184-85. Emison reported  
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26 <sup>3</sup> "Social Security Rulings do not have the force of law. Nevertheless, they  
27 constitute Social Security Administration interpretations of the statute it  
28 administers and of its own regulations," and are given deference "unless they are  
plainly erroneous or inconsistent with the Act or regulations." *Han v. Bowen*, 882  
F.2d 1453, 1457 (9th Cir. 1989).

1 “feeling well without specific complaints except for perceivable and progressing  
2 adenopathy”<sup>4</sup> and reported feeling “slightly fatigued.” AR 1184. Dr. Arzoo found  
3 Emison “remarkably asymptomatic.” AR 1185. The ALJ found that the medical  
4 records indicated Emison was in complete remission within less than a year,  
5 August 1, 2011. AR 34, 383-84, 403.

6 The ALJ noted that, after remission, “the frequency of the claimant’s follow-  
7 up chemotherapy treatment is lessened and, by extension, his episodes of post-  
8 treatment fatigue and stomach upset.” AR 34. The ALJ noted that these post-  
9 chemotherapy effects were not a chronic condition. *Id.* The medical records  
10 indicate that, after diagnosis, Emison underwent four monthly cycles of  
11 chemotherapy in April, May, June and July 2011. In September 2011, Emison  
12 began treatment with a different provider.<sup>5</sup> AR 1098. Emison was to undergo the  
13 fifth and sixth monthly cycles of chemotherapy, followed by maintenance Rituxan  
14 once every two months for 24 months. AR 1097-98. Emison completed the fifth  
15 cycle on November 1, which he tolerated well without nausea,<sup>6</sup> and the sixth  
16 cycle on December 1. AR 1069, 1079, 1089. On December 7 and 10, Emison  
17 was treated for nausea or vomiting. AR 1066, 1072, 1076. On December 16,  
18 Emison was diagnosed with acute bronchitis and presented with cough, sore  
19 throat, sinus congestion, nausea and loose stool. AR 1061, 1065. Emison began  
20 maintenance Rituxan treatment on January 25, 2012. He went home “in good  
21 condition.” AR 781. The medical record indicates his next Rituxan dose was set  
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23 <sup>4</sup> Adenopathy is the enlargement of a lymph node.

24 <sup>5</sup> Emison states that he obtained new insurance. JS at 9.

25 <sup>6</sup> When Emison presented with nausea and vomiting for one day on  
26 November 17, the doctor found that it was not caused by chemotherapy. AR  
27 1090. A note states: “Pt wants it noted in his medical record that the dog urine  
28 smell in front of his apartment makes him nauseous and causes his intermittent  
vomiting. Recommend pt to cont filing complaints, possibly move if necessary.”  
AR 1088. A few days later, Emison presented with headache, nasal congestion,  
fever and fatigue. AR 1079. The doctor diagnosed a likely virus. AR 1081.

1 for March 21, 2012. *Id.* At the hearing on March 26, 2012, Emison testified that  
2 he had gone to the ER the day before for nausea and weakness. AR 75. The  
3 ALJ observed that Emison was able to answer all questions alertly and  
4 appropriately.<sup>7</sup> AR 35. This court cannot say that the ALJ's assessment of the  
5 medical record is unsupported by substantial evidence. When the records are  
6 susceptible to more than one rational interpretation, a court must defer to the  
7 Commissioner's decision. *Moncada*, 60 F.3d at 523.

8 The ALJ rejected the representative's argument that Emison would be  
9 likely to miss more than two days per month due to treatment-related side effects.  
10 As discussed above, Emison was in complete remission less than one year after  
11 diagnosis and was undergoing maintenance Rituxan once every two months  
12 (January and March 2012 as of the date of the hearing). The ALJ reasonably  
13 inferred from the medical records that the side effects were not chronic and would  
14 occur, if at all, only after treatment. The ALJ noted Emison's testimony that he  
15 could be fine after the treatment for a couple of days and then feel effects. AR  
16 34, 75.

17 The ALJ noted Emison's testimony that he ceased working, not because of  
18 disabling symptoms, but because he was laid off in September 2010 prior to be  
19 being diagnosed or treated for non-Hodgkin's lymphoma.<sup>8</sup> AR 34, 76.

20 The ALJ found no indication Emison was unable to perform daily activities  
21 and household chores, and Emison has not cited any contrary evidence. AR 35.

22 The ALJ's credibility finding is supported by substantial evidence, and this  
23 court "may not engage in second-guessing." *Thomas*, 278 F.3d at 959 (citing  
24 *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999)).

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25 <sup>7</sup> Although not sufficient alone, an ALJ may rely on personal observations  
26 of a claimant's functioning in "the overall evaluation of the credibility of the  
27 individual's statements." *Orn v. Astrue*, 495 F.3d 625, 639-40 (9th Cir. 2007).

28 <sup>8</sup> By contrast, Emison's questionnaire stated that he stopped working due  
to his condition. AR 184.

IV.

**ORDER**

IT IS HEREBY ORDERED that the decision of the Commissioner is affirmed.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on all parties or their counsel.

DATED: July 26, 2013



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ALICIA G. ROSENBERG  
United States Magistrate Judge